

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
) No. 3:08-CR-142
vs.) Knoxville, Tennessee
) July 16, 2009
DAVID C. KERNELL,) 9:30 a.m.
)
 Defendant.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE C. CLIFFORD SHIRLEY, JR.
UNITED STATES MAGISTRATE JUDGE

For the Plaintiff: GREGORY WEDDLE, ESQ.
JOSH GOLDFOOT, ESQ.
MARK KROTOSKI, ESQ.

For the Defendant WADE V. DAVIES, ESQ.
ANNE PASSINO, ESQ.

Case 3:08-cr-00142 Document 73 Filed 08/04/09 Page 1 of 95

INDEX

EXHIBIT

NO.	DESCRIPTION	PAGE
1	Application & Affidavit to the Search Warrant and Search Warrant	19

(Note: Unless provided to the court reporter, all spellings are to the best phonetic approximation.)

1 This cause came on for hearing on the 16th
2 day of July, 2009, in the United States District Court
3 for the Eastern District of Tennessee, Northern
4 Division, before the Honorable C. Clifford Shirley,
5 presiding.

6 The Court having been duly opened, the
7 following proceedings were had, to-wit:

8 THE COURTROOM DEPUTY: All rise.

9 The United States District Court for the
10 Eastern District of Tennessee is now open pursuant to
11 adjournment with the Honorable C. Clifford Shirley,
12 Jr., presiding.

13 Please come to order and be seated.

14 Case number 3:08-cr-142, United States of
15 America versus David C. Kernell.

16 Greg Weddle, Mark Krotoski, and Josh
17 Goldfoot are here on behalf of the government.

18 Is the government present and ready to
19 proceed?

20 MR. WEDDLE: Ready to proceed, Your Honor.

21 THE COURT: Wade Davies and Anne Passino
22 are here on behalf of the defendant.

23 Is the defendant present and ready to
24 proceed?

25 MR. DAVIES: Present and ready, Your Honor.

1 THE COURT: All right. We're here on the
2 Motion to Suppress and there are some ancillary
3 motions and filings.

4 I think I'd rather start just with the
5 Motion to Suppress and then work our way through and
6 decide if there's a need for evidentiary testimony,
7 and if so, what it's going to look like and what
8 limitations it will have on it.

9 Does that sound okay to you, Mr. Davies?

10 MR. DAVIES: Well, what I would suggest,
11 Your Honor, is that we actually argue the merits of
12 the Motion to Suppress after we have the evidentiary
13 portion of the hearing, because I think the argument
14 is going to be key to the facts that come out during
15 the hearing itself.

16 And what I had -- what I would envision is
17 that we would put on Agent Fall (phonetic) and
18 perhaps Agent Fisher, and then Ms. Passino would
19 argue the merits of the motion based on the facts.

20 THE COURT: Well, there's two parts to your
21 motion, right?

22 MR. DAVIES: Yes.

23 THE COURT: One is the lack of probable
24 cause in issuing the search warrant to begin with.
25 No evidentiary hearing is required on that one,

1 right?

2 MR. DAVIES: That's right, except to the
3 extent if there is -- there is an issue about whether
4 there is probable cause or a necessity to seize the
5 entire computer. And I think that it is a potential
6 that some of the evidence would at least affect the
7 Court's ruling on that particular issue. But
8 generally the issues are probable cause and then
9 execution.

10 However, I think they're very much
11 interrelated, because our position essentially is
12 that this warrant actually does place limits on the
13 government. And only if it is read in a certain way,
14 which would allow them to do the almost limitless
15 search that appears to have been done, would we
16 really get into the fact that in order to do that you
17 would have to read it almost in a way that would make
18 it a general warrant.

19 So the probable cause and execution
20 arguments are very much intertwined I think.

21 THE COURT: They may be intertwined but I'm
22 still not following you as to how do you think you're
23 entitled to have an evidentiary hearing on the issue
24 of the issuance of the search warrant as opposed to
25 the execution of the search warrant.

1 MR. DAVIES: The evidentiary hearing is
2 almost exclusively on the execution of the warrant.

3 THE COURT: You still continue to hedge
4 with the "almost". I'm trying to figure out under
5 what scenario you think you're entitled to any
6 evidentiary hearing with regard to the first element.

7 MR. DAVIES: Only on the issue of whether
8 there is probable cause demonstrated in the warrant
9 for the government to need to seize the entire
10 computer rather than image it on site.

11 And I think that some of the evidence that
12 would be developed at the evidentiary hearing would
13 assist the Court in making that determination.

14 THE COURT: So are you saying that if I
15 hear testimony on that, even if the affidavit and
16 application was insufficient, I can now make it
17 sufficient because I have testimony that bolsters it?

18 MR. DAVIES: I think my argument would be
19 the opposite which will be --

20 THE COURT: Well, that's what you're hoping
21 the testimony will be. I understand that --

22 MR. DAVIES: That's right.

23 THE COURT: -- but in reverse if I agree
24 with you that the warrant was insufficient but the
25 testimony bolstered it, would it then be your

1 position that I could rely on it to bootstrap it
2 back?

3 MR. DAVIES: I don't think that would be
4 the case. And I think -- Normally I agree with the
5 Court that a probable cause determination is based on
6 the four corners of the affidavit itself.

7 In this case I think there is some -- not
8 vagueness but there is some question about whether
9 the affidavit itself demonstrates a reason why the
10 entire computer would need to be seized rather than
11 imaged, and I think that the facts brought out about
12 what is in fact capable could at least provide
13 background and guidance to the Court on that issue.

14 But going back to the main issue, I agree
15 that an evidentiary hearing is primarily warranted by
16 the second issue, which is the scope of the execution
17 of the warrant.

18 But really, Your Honor, the reason they're
19 so closely intertwined is that by and large we only
20 get to the probable cause issue and the sufficiency
21 of the warrant if we get to a point where this
22 warrant is read so broadly that it could authorize
23 the almost limitless search that was carried out.

24 So that's why I really think it makes more
25 sense to argue both of those issues at the same time,

1 because they're going to be -- we're going to be
2 going back and forth. I think the Court will
3 probably have questions that are relevant to both
4 issues.

5 So that's why it makes sense to me to put
6 on the proof first and then argue it.

7 THE COURT: Okay. What do you say,
8 Mr. Weddle?

9 MR. WEDDLE: Well, as the Court might
10 suspect, we disagree. There again is no reason to
11 have any evidence on the issue of whether there's
12 probable cause in the application for the search
13 warrant.

14 The search warrant specifically authorized
15 the agents to take the Acer laptop computer. The
16 affidavit establishes that it is an instrumentality
17 of the offense. Whether it could be imaged on site
18 is of really no consequence to this warrant, and
19 there's no need to take any evidence on that.

20 It's an instrumentality of crime. The
21 warrant -- The affidavit either establishes or
22 doesn't establish that, and the warrant authorized
23 the agents to take that computer.

24 I think that we should -- Again, Your
25 Honor, without getting into too much argument here I

1 think what Mr. Davies wants to do is to try to put up
2 some evidence to see if he can make something. I
3 think we should argue the legal issues in this Motion
4 to Suppress and then take up what factual issues are
5 in dispute with respect to the execution of the
6 warrant.

7 Those two things -- as much as Mr. Davies
8 says are interrelated, they're really not. They're
9 separate issues. They ought to be dealt with
10 separately. And that's how we would prefer to
11 proceed, Your Honor.

12 THE COURT: All right. I think I tend to
13 agree with Mr. Weddle or else he tends to agree with
14 me with regard to the scope of the hearing.

15 I will say this: If it turns out that I
16 think in the argument on probable cause that there is
17 some need for some evidentiary proof, we'll have the
18 opportunity to get that later in the second part. If
19 I allow it with regard to the execution, I can simply
20 provide that that can be inquired into and set the
21 parameters on that.

22 But at this point I would like to hear
23 first, whether it's you or Ms. Passino, on the
24 probable cause argument.

25 MS. PASSINO: Good morning, Your Honor.

1 THE COURT: Good morning.

2 MS. PASSINO: I'm not sure I'm going to be
3 able to separate these two issues. I'll do my best.

4 The Motion to Suppress -- That's
5 Document 20, Government's Response 22, and our reply
6 Document 27. The original Motion to Suppress is
7 styled Motion to Suppress evidence for which no
8 probable cause existed having been obtained either
9 outside the scope of authority granted by the warrant
10 or under the authority of the general search warrant.

11 The issue that we would hope to show by the
12 proof is that the search warrant here issued based on
13 probable cause to seize limited files from
14 Mr. Kernell's computer but that the computer has been
15 examined as if there were no limitations.

16 Because this is the overarching issue there
17 are really four considerations that have to be looked
18 at before you get to whether or not there was
19 probable cause; questions like are there any
20 limitations on a computer inspection, even one
21 authorized by a search warrant? What does it mean to
22 execute a search warrant?

23 Here the search warrant issued
24 September 20th at 11:17 p.m. commanding the agents to
25 search on or before September 29th. The return

1 indicates that it was executed shortly after it was
2 issued; that is, September 20th at 11:55.

3 When looking at the computer search warrant
4 and probable cause issues, there is sort of an
5 interesting twist, which is searches and seizures are
6 -- there are multiple searches even if there's only
7 one seizure. And we would argue that there are
8 multiple seizures.

9 So based on Korton (phonetic) versus
10 California's characterization of what constitutes a
11 search and what constitutes a seizure, even though
12 the laptop itself was physically seized the same
13 night the warrant issued, the searches, based on the
14 expert reports provided, were multiple and prolonged.

15 The next issue --

16 THE COURT: What do you consider a multiple
17 search? Opening each file?

18 MS. PASSINO: I wouldn't even have to go
19 that far. Different programs were run on the
20 computer by different government agents in different
21 cities at different times.

22 THE COURT: If someone were to go into a
23 business and conduct a search pursuant to a search
24 warrant, open a file drawer in a filing cabinet,
25 would each file they look in in your mind be a

1 separate search?

2 MS. PASSINO: No.

3 THE COURT: Then why would looking in a
4 file on a computer that contains the same information
5 be a multiple search?

6 MS. PASSINO: Well, another difference
7 between looking in a filing cabinet and looking in a
8 computer file is that there isn't a direct sensory
9 correlation between looking at a piece of paper -- A
10 computer search depends on running a program in order
11 to get access to what that data means and looks like.

12 So even if say multiple -- opening multiple
13 files on one computer did not constitute a search,
14 when did that window of time need to -- when did
15 those single searches of multiple files -- what time
16 period did those need to occur in to be reasonable
17 under the Fourth Amendment?

18 THE COURT: So now it's not the scope, what
19 they can look in, it's when they can look in it?

20 MS. PASSINO: It's both. It's what they
21 looked at, how much, how often, and where.

22 THE COURT: All right.

23 MS. PASSINO: Which sort of goes to what
24 does Rule 41 mean in terms of a computer search. If
25 the statutes and rules meant to facilitate judicial

1 oversight aren't as applicable under -- when you're
2 looking at a forensic computer search, what
3 limitations are there? And as set out in our motion
4 the conclusion required by the law is that there must
5 be limitations.

6 In Illinois versus Cabalis (phonetic) the
7 United States Supreme Court, although they are
8 upholding the search, reminded that even a search
9 that's lawful at its inception can violate the Fourth
10 Amendment if its execution unreasonably infringes
11 interests protected by the Constitution.

12 THE COURT: I'm not meaning to cut you off,
13 but I understand that part of the argument. That was
14 what I was anticipating would be second, the limits,
15 if any, on the execution of the search warrant and
16 whether that was exceeded or not.

17 MS. PASSINO: And those arguments turn on
18 what is the meaning of -- what is the significance of
19 the repeated and prolonged searches? If those were
20 authorized by the search warrant, then it's a general
21 warrant, and that does get to the probable cause.

22 But those same repeated and prolonged
23 searches -- if those aren't authorized by the search
24 warrant, then that's where Your Honor is correct that
25 the focus is on did that exceed the scope of

1 authority granted under the search warrant.

2 One of the cases cited -- I believe it was
3 cited for the first time in our reply -- was United
4 States versus Corado (phonetic) in which officers
5 sought and obtained a search warrant for a marijuana
6 grow house. They got there. They didn't see anyone,
7 so they decided to even wait out the five-day period
8 to see if anyone showed up during that time.

9 That evidence was suppressed because those
10 officers -- once their authority to be there expired,
11 they remained in the house for more time than was
12 reasonably necessary to execute the scope of a search
13 warrant.

14 Perhaps more on point is the case decided
15 by the 11th Circuit just this April, which is United
16 States versus Mitchell. That defendant was targeted
17 as potentially having child pornography on his
18 computer.

19 The issue before the Court in terms of
20 suppression wasn't whether or not the computer was
21 lawfully seized. It wasn't seized pursuant to a
22 search warrant, but it was seized, taken off site.

23 The agent who was going to perform the
24 forensic search ended up going on a training session.
25 He returned 21 days later, got his search warrant at

1 that point. And the issue was whether that 21-day
2 delay was reasonable.

3 The Court held that it wasn't reasonable.
4 And it wasn't reasonable because the computer wasn't
5 lawfully seized and it wasn't reasonable because
6 the -- even though the computer search could not have
7 taken place and been completed within that same
8 period of time.

9 The recognition in Mitchell is sort of the
10 sentiment expressed in Kyler (phonetic), which is
11 there are limits on technologies.

12 So the computer forensic search seeks
13 access to the equivalent of thousands and tens of
14 thousands of pages of documents doesn't make it --
15 doesn't make -- There is no computer exception to the
16 Fourth Amendment, so you have to -- one looks at the
17 traditional notions of privacy.

18 Computer data has been recognized as an
19 interest in which individuals have a privacy interest
20 and that means that there are limitations, and when a
21 reasonableness consideration is performed on the
22 search, that that factors in.

23 I was trying to think of a good analogy for
24 a computer search. I mean it is unique and pretty
25 new technology. The Supreme Court really hasn't

1 looked at it. And one of things that makes sense to
2 me at least is looking back at Ibarra. I mean it's a
3 pretty classic case.

4 The officers had a search warrant to go in
5 and look for evidence of drugs. They also had
6 probable cause to look for a bartender. But because
7 the agents patted down the patrons that made the
8 search in violation of the Fourth Amendment because
9 the search warrant hadn't alleged that there was --
10 that that place was frequented by people who dealt or
11 bought or sold drugs.

12 So the search warrant in this case -- And
13 this does get back to probable cause, and I apologize
14 for bouncing back and forth. But the search warrant
15 in this case made no allegations that this was other
16 than a one-time thing.

17 That is, the case cited by the government
18 in their response was I think United States versus
19 Tillotson, which more eloquently says it was -- they
20 compare the facts in that case to perhaps what would
21 have -- they would have reached a different outcome
22 based on an isolated circumstance of brief duration.

23 So like in Ibarra --

24 THE COURT: Is that in that case? Does
25 that say that?

1 MS. PASSINO: It's a contrast to what they
2 saw.

3 THE COURT: Okay.

4 MS. PASSINO: But the search warrant here,
5 like the search warrant in Ibarra, didn't allege a
6 systemic -- or, you know, that the place was imbued
7 with criminal content or activity. And so the
8 files -- you know, propinquity does not equal
9 probable cause. Just because you're -- you are in a
10 location, just because --

11 THE COURT: Are you saying there was no
12 probable cause to search his computer at all?

13 MS. PASSINO: No. That's not what I'm
14 saying.

15 THE COURT: All right. Then what are you
16 saying?

17 MS. PASSINO: I'm saying that there was no
18 probable cause to search his computer in the way that
19 it was searched.

20 All the files on a computer are not
21 co-equal. There are files created at different time
22 periods. There are files that are more or less like
23 what the search warrant granted them authority to
24 seize. And that's mostly based on the limiting
25 characteristics of paragraph 1's attachment B talking

1 about the gov.palin and Yahoo and rubico.

2 THE COURT: Do you have a copy of the
3 search warrant?

4 MS. PASSINO: I do.

5 THE COURT: Has it been made an exhibit to
6 any of the filings? It's usually of benefit before
7 challenging a search warrant.

8 MR. DAVIES: I think that it has, but we
9 need to make sure that it has.

10 THE COURT: I'm not sure.

11 MS. PASSINO: I'm not sure.

12 THE COURT: Do you have a copy at hand?

13 MS. PASSINO: I have a copy that's
14 scribbled all over.

15 THE COURT: Do you have an unscribbled-on
16 copy?

17 MR. DAVIES: I do. It only contains your
18 scribbling, Your Honor.

19 THE COURT: My scribbling will be
20 considered.

21 And so that we understand, so that it's
22 clear, what I'm looking at and my demarcations -- and
23 you tell me if I'm wrong -- is that your argument on
24 probable cause -- because I issued the search
25 warrant -- is that I erred.

1 The second argument, the execution, is,
2 well, even if you didn't err, Judge, and you issued a
3 good search warrant, the agents erred because they
4 went way too far.

5 Now, am I misstating that? Is not the
6 difference in the two arguments?

7 MS. PASSINO: I would restate that to say
8 that the issue with both arguments turns on the face
9 of the warrant.

10 The warrant -- Our position is that the
11 warrant does contain limiting information. If it is
12 read -- and it appears to have been read by the
13 executing agents not to include those limitations,
14 then it is in our warrant. If it does include those
15 limitations which are on the face of warrant, then
16 the execution exceeded the scope of the authority
17 granted under the warrant.

18 MR. DAVIES: Your Honor, if I may approach,
19 I have a copy. I would make it Exhibit 1 to this
20 hearing, which is the application and affidavit to
21 the search warrant, the warrant itself, and the
22 attachments, and the return.

23 (Exhibit 1 was admitted into evidence.)

24 THE COURT: Okay. Go ahead.

25 MS. PASSINO: The second half of the

1 argument, which is the general search warrant
2 argument, is really based on particularity, which
3 is -- The purpose of requiring the places and items
4 to be searched and seized to be described with
5 sufficient particularity is to limit officers'
6 discretion when executing a warrant.

7 You know, the primary purpose of that is to
8 prevent wide-ranging exploratory searches. That is,
9 you can't say someone is involved in a crime,
10 therefore, everything associated with them is fair
11 game to be searched. There must be carefully
12 tailored and particularly described items to be
13 searched.

14 The cases cited in the motion were United
15 States versus Abboud (phonetic) -- that's a Sixth
16 Circuit 2006 decision -- and United States versus
17 Ford, another Sixth Circuit decision; that one from
18 1999. These cases -- I think anyway aren't helpful
19 looking at what -- how could this warrant have been
20 executed? What limitations were there based on the
21 probable cause as set forth in the affidavit.

22 In Abboud the warrant was considered
23 overbroad because it authorized the search for
24 records from '96 to 2002, but there was probable
25 cause for just a three-month period in '99.

1 Here, according to those -- to the
2 affidavit, this was -- what investigators were
3 interested in was something that took place over a
4 few days in September of 2008.

5 To be sure, the degree of specificity
6 depends on what information is available to police at
7 the time they seek the search warrant, though there
8 is a correlation between the amount of particularity
9 and probable cause itself. The more particularly
10 something is described the more likely that there is
11 probable cause.

12 The information in the affidavit did not
13 present probable cause to believe that this was
14 anything other than an isolated circumstance of brief
15 duration. This was not like the facts in Tillotson.
16 This was not -- This was different.

17 So given the speed at which technology
18 changes, the government's reliance on Guest versus
19 Leis, the Sixth Circuit opinion from 2001, to say
20 that seizing an entire computer is consistent with
21 the Fourth Amendment is relevant. But that case was
22 decided eight years ago. Technology and what is
23 reasonable now has changed.

24 And I think that's what -- why we cited to
25 the Department of Justice's manual on searching and

1 seizing computers, which suggested that perhaps
2 imaging a computer on site is more appropriate or
3 more reasonable than looking at that on a
4 case-by-case basis.

5 The allegations in the search warrant did
6 not support seizing the entire computer so --

7 THE COURT: The warrant what? The warrant
8 did not authorize seizing the Acer computer?

9 MS. PASSINO: The warrant did. The
10 allegations in support do not.

11 I guess this gets back to so what are we
12 asking for or what should have happened? And I think
13 depending on what the proof is -- the proof that some
14 of the things that could have been done include, as
15 mentioned in the motion, some building up of probable
16 cause; that is, checking back with the Court for a
17 second search warrant or for a limiting protocol,
18 limiting the number of searches, limiting the
19 duration of searches, limiting the method of
20 searches, creating filters to exclude parts of the
21 hard drive for which there was no probable cause.

22 We don't know exactly what's been done. We
23 have the results of the searches, but we don't know
24 the processes by which those results were arrived at.

25 THE COURT: How would that have occurred?

1 I'm having trouble figuring out how that would occur.

2 MS. PASSINO: Well, United States versus
3 Mitchell, the case I talked about earlier where the
4 computer was seized and then the second search
5 warrant was sought, is a decent model, which is to
6 say even if the computer had been seized pursuant to
7 the search warrant a second search warrant could have
8 been sought to say here are the things that we now
9 know or the areas on the hard drive or the protocols
10 we'd like to run in order to look for what we believe
11 is there rather than looking everywhere for what they
12 did have probable cause to look for.

13 THE COURT: And how would they do that?
14 For example, I mean I understand that if there was a
15 file that was entitled "Hacking File", that they
16 might -- you might say they're limited to looking in
17 that file. What if they had a file that said,
18 "Government Class 101?" You would argue, well,
19 that's obviously his schoolwork, and they shouldn't
20 be going through that file. But what if that's where
21 he chose to put these files? How would they ever
22 find it?

23 MS. PASSINO: Many courts have pointed out
24 that a person engaged in criminal activity isn't
25 likely to say, "Here is my crime file," that -- And

1 the affidavit suggested there are ways to hide, booby
2 trap, to mislead investigators. So it's -- the issue
3 isn't whether or not they had probable cause to
4 search in a mislabeled or potentially mislabeled file
5 but what they had probable cause to search for.

6 THE COURT: So now it's not where they
7 searched but what they were searching for? I thought
8 the argument was that they wholesale went through all
9 the files, and that was the problem. It was the
10 where that was the problem. What I hear you say now
11 is it's not where they searched but what they
12 searched for.

13 MS. PASSINO: Respectfully, there are
14 multiple problems with what occurred on the computer
15 so --

16 THE COURT: Well, how would you search for
17 something that was intentionally put in a misnamed
18 file?

19 MS. PASSINO: If the question is where
20 then --

21 THE COURT: Uh-huh.

22 MS. PASSINO: And my knowledge of computers
23 is pretty rudimentary, so I'm not going to pretend to
24 know exactly the ways in which Encase (phonetic) can
25 be programmed to limit, but my understanding is that

1 you can limit the where on the hard drive to times in
2 which files were created, so that the where can be
3 limited and the what can be limited to types of
4 files.

5 Did the warrant authorize you to look for
6 personal information? Once you find that personal
7 information is it like with opening a filing cabinet?
8 Do you then move on to the next file once you
9 discover that it's not relevant, or is that
10 incorporated into the search?

11 THE COURT: But at the first instance when
12 I'm issuing the search warrant how do I limit that?

13 MS. PASSINO: Paragraph one --

14 THE COURT: Like, for instance, let's say
15 I'm issuing a search warrant for someone to go into a
16 warehouse and go through the filing cabinets looking
17 for some very specific documents of illegal activity.
18 Assuming they're like drug transaction records,
19 they're not likely to be in a file marked "Drug
20 Transaction Records." So they're going to be in some
21 other kind of file. How is it that I limit which
22 drawers they can look in?

23 MS. PASSINO: Well, maybe one of the ways
24 is to limit the number of times they can look in that
25 drawer. With Q word searches running on a program

1 the -- While a file may not be labeled "Drug
2 Transactions", there are data points that correlate
3 to the probable cause requirement I think.

4 And I'm sure that the government and its
5 experts know more than I do, but one of the
6 suggestions that I've seen, at least in the academic
7 literature, is that the search protocol can be
8 limited to items for which -- and similar items for
9 which there is probable cause.

10 How is one to determine whether a file is
11 or isn't similar to a term in the warrant? That
12 level of discretion is something that is contrary to
13 the Fourth Amendment even if they could look in that
14 file to begin with.

15 THE COURT: But that is in essence your
16 argument, that there needs to be a search protocol
17 placed in a search warrant at the inception?

18 MS. PASSINO: Well, that is one suggestion.
19 We're here today and we're seeking to put on proof to
20 show that even on the tail end you can see whether or
21 not something was reasonable so --

22 THE COURT: But I mean isn't that your
23 argument? There needs to be a search protocol?

24 MS. PASSINO: That there needs to be some
25 kind of limitations and the character of those

1 limitations is up to the Court.

2 THE COURT: Is there any Supreme Court or
3 Sixth Circuit precedent that there needs to be a
4 search protocol in any search warrant?

5 MS. PASSINO: In any search warrant? That
6 goes I would say back to the Corado case, the Cabalis
7 case, that a valid warrant or a valid search,
8 although the methods and particular means of
9 searching aren't required to be specified, if the
10 manner of searching is unreasonable and could have
11 been made reasonable, that -- It's a separate issue,
12 but I think it's related enough to show that the
13 manner isn't wholly without -- the manner in which
14 the search warrant is executed isn't wholly without
15 limitation.

16 THE COURT: I may be reading that wrong,
17 but it seems to me that you're placing the burden on
18 all Magistrate Judges that if they can envision how
19 an agent might misuse a warrant that they have some
20 sort of an obligation now to add in language to
21 prevent that.

22 In other words, if I say you can only go
23 search such and such a room in a house, if I envision
24 that they might go to another room, I now have to put
25 limiting language about that specific other room.

1 In other words, you're saying I should
2 envision that they're not going to follow my orders
3 and put limiting language beyond that.

4 MS. PASSINO: Well, I think what this
5 recognizes -- what our position argues is that
6 computers -- the analogy of traditional Fourth
7 Amendment concepts applies and transfers but that it
8 is a unique circumstance because there is a search
9 for that computer. That computer is seized and that
10 computer is researched.

11 So the limitations that a Magistrate Judge
12 places on the search isn't required to exclude all
13 other locations for the seizure. What the
14 protocol -- And I'm not sure that that's the right
15 word. But what some sort of judicial oversight on
16 the subsequent searches of the computers should do if
17 it's not in the original warrant -- and there may not
18 be enough information to do that on the front end --
19 but at some point there should -- an order to be
20 reasonable and comply with the Fourth Amendment
21 instead of waiting until the search has been
22 completed and privacy interests have been invaded
23 that there are ways in which limitations can be
24 acknowledged. And it doesn't assume, I don't think,
25 that --

1 THE COURT: Well, let me ask you this --
2 And I understand the difference in computers, and I
3 understand there's this attempt to take standard
4 Fourth Amendment search of places and extrapolate it
5 into computers. We have to do that.

6 My question is if I took your argument and
7 applied it to computers, then would people try to
8 extrapolate back? In other words, if I have to now
9 have judicial review over the method and manner in
10 which a search is conducted on the front end, would
11 that be true about going into a house and issuing a
12 search warrant to search for drugs?

13 Would I say, well, now we need to sit down
14 and decide how we're going to do that? Do I become
15 part of the team that goes in and part of the
16 strategy of how it's going to be accomplished, which
17 door they're going to go in, and how they're going to
18 do that?

19 I mean wouldn't that be a reasonable
20 argument if I accepted your argument that, Judge, you
21 should have set up a methodology and had judicial
22 review of this search, so you should obviously have a
23 judicial review of these other searches? Where does
24 it end? I mean that's part of my problem, you
25 understand.

1 MS. PASSINO: I do understand.

2 THE COURT: And I'm troubled -- Let me ask
3 you about this. Your brief says the warrant did not
4 authorize -- my search warrant did not authorize the
5 wholesale examination of all files on Mr. Kernell's
6 computer, but you seem to be arguing what's wrong
7 with your warrant is you did authorize that. But
8 your argument is I didn't. Now, help me with that.

9 MS. PASSINO: If you can direct me to
10 the --

11 THE COURT: Page 6 --

12 MS. PASSINO: Page 6.

13 THE COURT: -- bottom last full line and up
14 to the first part of page 7 on Document 20.

15 MS. PASSINO: My understanding of that is
16 that when the motion says the warrant did not
17 authorize the wholesale examination, that assumes
18 that there was a wholesale examination. That assumes
19 that -- I think what we've been talking about is
20 there were limitations within the search warrant.

21 The warrant did not authorize the wholesale
22 examination, and if that's what occurred, as the next
23 sentence says, to the extent that the government has
24 subsequently examined the computer and all its
25 contents the government has exceeded the scope of the

1 warrant.

2 I think implied in that is that there were
3 limitations. It did not authorize the wholesale
4 examination but a wholesale examination --

5 THE COURT: Well, then what's wrong with
6 the warrant?

7 MS. PASSINO: It depends on how the warrant
8 is read. I think the argument --

9 THE COURT: No, it depends on how the
10 warrant is executed, doesn't it?

11 MS. PASSINO: How the warrant was read by
12 executing agents.

13 THE COURT: Right, so we're back to what
14 they did with my warrant as opposed to whether my
15 warrant was bad at the inception.

16 MS. PASSINO: The two issues in the
17 alternative are both related to the execution of the
18 warrant -- the perspective of a person looking at the
19 warrant, executing the warrant -- I think that was
20 the tact that the motion tried to take.

21 THE COURT: All right. Let's talk about --
22 Part of your argument I think is that I allowed them
23 to take the computer, thereby allowing an offsite
24 search. I think you contend that's improper. Is
25 that right?

1 MS. PASSINO: That was in the motion, yes.

2 THE COURT: All right. What's wrong with
3 that? Did you want them to sit there and do their
4 search protocol for the next couple of days in the
5 apartment with all these people --

6 MS. PASSINO: No, and --

7 THE COURT: -- all his roommates sitting
8 around?

9 MS. PASSINO: No. My understanding is that
10 when a computer is -- I guess there's several parts
11 to getting to -- to making a copy. So you image it,
12 you mirror it, whatever the terminology is, but that
13 that process doesn't require you to once you've done
14 that to sit there and perform the search on site.
15 You can then take your copy of the hard drive
16 wherever you want to take it, leaving the original
17 there.

18 THE COURT: Okay. If the computer is an
19 instrumentality of the criminal offense, do you just
20 leave it with the suspect?

21 MS. PASSINO: No. Rule 41 allows
22 instrumentality obviously to be seized.

23 THE COURT: And you've heard Mr. Weddle's
24 argument that seizure of the actual computer was in
25 part because it was an instrumentality. What do you

1 say about that?

2 MS. PASSINO: Whether or not the computer
3 itself was an instrumentality, I don't think goes to
4 whether or not there was reason to either seize it or
5 search it but whether there was probable cause to
6 seize it or search it. So its status as an
7 instrumentality, if it is, it's probably seizable, if
8 it's characterized by the government in that fashion.
9 That's not the crux of our argument.

10 THE COURT: All right. Do you believe
11 there was probable cause to seize the computer?

12 MS. PASSINO: I'm not sure how to answer
13 that.

14 THE COURT: Okay. All right. Go ahead.

15 MS. PASSINO: I think I've probably
16 repeated this too much and I'll try and come to some
17 sort of conclusion here.

18 The argument about what and whether there
19 are limitations on the search of a computer, even
20 when pursuant to a search warrant, after it's been
21 seized, really isn't that different from what courts
22 have had to do before and that -- The Fourth
23 Amendment has had to accommodate new technologies
24 before. The Fourth Amendment has -- from Olmstead
25 (phonetic) in requiring physical intrusion, to Katz

1 (phonetic) in recognizing invasion of privacy, to
2 Kyler, which says the Court's job is to ensure that
3 new technology doesn't infringe our traditionally
4 protected notions of privacy rights, that because to
5 date there is no computer exception to the Fourth
6 Amendment, that discretion -- that the warrant
7 limited the discretion, but that the executing
8 officers exceeded the scope of that authority.

9 THE COURT: And is that because they went
10 into too many files or they went into files for too
11 long in your mind?

12 MS. PASSINO: Without hearing proof about
13 what actually happened, and only having the results
14 of those searches, the problems are the number of
15 times that those files were accessed, the duration of
16 those periods of access, the number of people who
17 went in there --

18 THE COURT: And I guess that's kind of my
19 question. Let's suppose again we use the analogy of
20 someone going into a house or warehouse or business
21 looking for files in file cabinets, and they find
22 them. They find 15 files out of a hundred that are
23 seizable, okay, and they bring them back. Is it your
24 argument they can only have looked through those 15
25 files that one time, or when they bring them back,

1 they can continue to look through them everyday until
2 the trial if they want to?

3 MS. PASSINO: I'm not sure that this
4 exactly answers the Court's question, but I think my
5 understanding of the government's response in part is
6 that if you have a right to be -- if you have
7 probable cause to at least in part search a computer,
8 then an electronic version of the plain view
9 exception is triggered.

10 In the case of the filing cabinets there's
11 still probable cause to -- required in order to
12 access that filing cabinet, which means the documents
13 that are seized for which there is probable cause --
14 look at them as many times as you want.

15 The documents for which there is no
16 probable cause -- I think that's more akin to the
17 situation in -- is it Andreson versus Maryland --
18 where the search warrant was executed. Many types of
19 documents for which there was probable cause were
20 seized, but there was a whole -- you know, cases of
21 stuff that were unrelated to the purpose of the
22 warrant.

23 Those documents I think first were
24 suppressed and then some -- first were excluded and
25 then later suppressed. And I may be getting that

1 wrong. But the number of times that a file is
2 opened, if there is probable cause to open that file,
3 is a separate question from the number of times that
4 a file for which there is no probable cause that's
5 unrelated to the allegations in the search warrant
6 affidavit was opened.

7 THE COURT: Are you contending that files
8 for which there was no probable cause were opened
9 more than once?

10 MS. PASSINO: I don't know. I don't know.

11 THE COURT: Okay. Not knowing if they were
12 opened simply once to determine if it was a file that
13 met the criteria or not, they determined it wasn't
14 and they closed it, didn't go back and reopen it,
15 would that be a problem if it turned out to be in
16 fact a government class set of notes, and they said,
17 well, that's not it, and went on to the next file?

18 MS. PASSINO: I know that the extra reports
19 are not in the record and I don't want to go into
20 them too much, but if the Court would allow me to
21 give an example.

22 THE COURT: Okay.

23 MS. PASSINO: Some of the items included in
24 the final report are personal e-mails between
25 Mr. Kernell's aunt and uncle, including Pay Pal

1 information, their credit card information, and user
2 e-mails months before anything relevant to the
3 allegations in the search warrant affidavit.

4 THE COURT: And where did you say those
5 were?

6 MS. PASSINO: These were attachments to --
7 Some of the attachments were also incorporated within
8 the body of the report, but there were personal
9 e-mails unrelated to Mr. Kernell that were included
10 in the final report.

11 THE COURT: And what does that mean? They
12 were looked at? They were looked at once? They were
13 looked at a hundred times?

14 MS. PASSINO: And they were relied upon.

15 THE COURT: Now, wait a minute. I asked
16 you a question. What does it mean a file report?
17 Does it mean they didn't look at it? They did look
18 at it? They looked at it once? What does -- I don't
19 know what you're telling me. I understand there's an
20 e-mail between him and his aunt.

21 MS. PASSINO: The final forensic evaluation
22 of the computer --

23 THE COURT: Right.

24 MS. PASSINO: -- included copies of
25 personal e-mails. While I don't know how many times

1 those e-mails were looked at -- I'm looking at them
2 right now -- is unsupported by the search warrant
3 affidavit.

4 THE COURT: Maybe we're having a
5 disconnect. I'm not sure what you're telling me.

6 MS. PASSINO: I apologize.

7 THE COURT: They looked at an e-mail and
8 they shouldn't have?

9 MS. PASSINO: They looked at an e-mail that
10 was not relevant and --

11 THE COURT: How would they know that until
12 they read it?

13 MS. PASSINO: Having -- Once something is
14 looked at I think -- that's like the filing cabinet,
15 you can see this is or isn't what you're looking for.

16 THE COURT: Okay. So they looked at it.

17 MS. PASSINO: So they looked at it --

18 THE COURT: There's nothing wrong with
19 looking at it to see if it's relevant.

20 MS. PASSINO: Well --

21 THE COURT: Is there?

22 MS. PASSINO: -- maybe.

23 THE COURT: I have to deal with beyond
24 "maybe".

25 MS. PASSINO: If it were an irrelevant

1 document within the relevant time period, I think
2 that's different from an irrelevant document outside
3 the relevant time period.

4 THE COURT: Okay. So once they look at it,
5 if they say it's not relevant, then they don't look
6 at it again?

7 MS. PASSINO: Then they don't make it part
8 of a final report submitted as part of --

9 THE COURT: Well, what does the final
10 report say? These are all the files we looked at
11 that we think are relevant? These are all the files
12 we looked at? These are all the files we seized? I
13 mean what's the universe of files that are being
14 disclosed to you in the expert report?

15 MS. PASSINO: I would assume files that
16 they are relying upon to establish their case.

17 THE COURT: Okay. All right.

18 MS. PASSINO: All right. If the Court has
19 no further questions --

20 THE COURT: All right. Let me hear from
21 the government.

22 MR. GOLDFOOT: Good morning, Your Honor.

23 Once again my name is Josh Goldfoot. I'm a
24 travel attorney with the Computer Crime & Electronic
25 Property Section.

1 Your Honor, the warrant in this case
2 authorized the search of the computer pursuant to a
3 protocol that has been approved by courts in various
4 jurisdictions for over a decade of precedent.

5 The defense has not cited any cases in
6 which any court in the country has ever suppressed
7 computer evidence based on a search of this type, nor
8 has the defense suggested any way in which the
9 particular execution of this warrant was
10 unreasonable.

11 THE COURT: We'll take that up later, the
12 execution.

13 MR. GOLDFOOT: Yes.

14 THE COURT: We're sticking with the
15 probable cause to issue a warrant at this point.

16 MR. GOLDFOOT: On probable cause, Your
17 Honor, we haven't heard any -- we haven't seen any
18 argument in the motion filed in January or today that
19 disputes that this affidavit tells a story that leads
20 to the inescapable conclusion that inside that
21 apartment was records of the offense described in the
22 warrant; nor have we found much of a dispute that
23 within that apartment the computer records at least
24 were going to be found on the defendant's computer
25 that was seized.

1 Even the defense has conceded in their
2 motion that the warrant authorized the search for at
3 least some files on that computer. To the extent --
4 So I'm not sure, therefore, how probable cause is
5 even at issue. We have a concession that there was
6 probable cause to believe that at least one file on
7 that computer was called for by warrant and was
8 supported by the affidavit.

9 The only issue, Your Honor, becomes whether
10 the particular method of search of examining the
11 computer and files in that computer to determine
12 which of those files fell within the warrant was
13 proper.

14 And it's there, Your Honor, where they
15 essentially from that spinoff two legal arguments.
16 One of those legal arguments claiming that there
17 wasn't probable cause and the other saying that if
18 the warrant authorized that, it was a general
19 warrant -- although we'll discuss that issue
20 separately.

21 I believe the only execution argument
22 that's briefed is another spinoff of that same
23 argument that looking at every file is in some way a
24 violation.

25 But, Your Honor, that process of examining

1 every file on a computer to isolate the files that
2 are in fact called for by the warrant has
3 specifically been signed off on not only by the Sixth
4 Circuit in Guest versus Leis, not only by Judge Greer
5 adopting magistrate recommendation in this circuit in
6 United States versus Tillotson, but, Your Honor, the
7 warrant in this case -- I should say both of the
8 warrants as there were two -- we've only heard
9 discussion of one -- specifically previewed for the
10 Court that just such a procedure would be applied to
11 the computer in this case.

12 Now, when the warrant in advance gives the
13 magistrate reviewing it notice of some indication of
14 how the search is going to be executed, I've not
15 heard of a single case that has successfully made an
16 argument that there was a search in flagrant
17 disregard of the warrant with respect to its
18 execution when you're doing exactly what you told the
19 magistrate in advance you would do.

20 I see the Court flipping through the
21 warrant. Would you like a page reference?

22 THE COURT: Well, when you say the warrant,
23 you mean the affidavit?

24 MR. GOLDFOOT: I'm sorry. Yes, I mean the
25 affidavit.

1 THE COURT: You just need to be particular.

2 MR. GOLDFOOT: It's a bad habit of mine.

3 THE COURT: Warrant sometimes is used as
4 all inclusive of all things attached to it. But in
5 this case we're having to break it down.

6 MR. GOLDFOOT: Yeah, absolutely.

7 I'm referring to the affidavit in support
8 of the September warrant. Now, there is also a
9 warrant on a --

10 THE COURT: And what part are you referring
11 to specifically?

12 MR. GOLDFOOT: Give me a moment, please.
13 (Looking.) Page 11 of the September warrant
14 affidavit, paragraphs 31 and 32, give sort of a
15 preview --

16 THE COURT: Right.

17 MR. GOLDFOOT: -- of how this is going to
18 happen.

19 Now, it mentions there that I know that in
20 order to completely and accurately retrieve data
21 maintained on computer hardware on computer software
22 yada, yada, yada, (sic) it is often necessary that
23 some computer equipment, peripherals, rates,
24 instructions, yada, yada, be seized and subsequently
25 processed by a qualified computer specialist in a

1 laboratory setting.

2 Right there giving the reviewing magistrate
3 notice that the entire computer is going to be
4 seized, taken to a laboratory, and processed there.
5 That's the exact procedure that's now being
6 challenged as flagrant disregard in this motion.

7 THE COURT: Okay.

8 MR. GOLDFOOT: Now, while we're still
9 talking about the subject of probable cause, there
10 seems to be an argument, which wasn't clear to me
11 from the brief, but that it was necessary to have
12 probable cause to justify a particular step taken in
13 executing a warrant.

14 That is not the purpose of probable cause.
15 The probable cause is required to -- excuse me --
16 probable cause to believe that contraband or evidence
17 of a crime or instrumentality of a crime will be
18 found in the location to be searched.

19 The warrant process is not about how
20 evidence will be searched. It is about what may be
21 searched. Issues pertaining to the execution are not
22 decided during the period when the magistrate reviews
23 the warrant but decided after the fact.

24 The two cases from the Supreme Court that
25 tell us that, but not in computer context, would be

1 United States versus Groves (phonetic) and United
2 States versus Dolly (phonetic). They're both cited
3 in our brief.

4 I don't want to take up the Court's time
5 unnecessarily discussing the answers to questions the
6 Court already knows, but if there are other issues
7 that the Court is interested in, I'd be happy to
8 address them.

9 THE COURT: No. I think on that issue I'm
10 okay.

11 MR. GOLDFOOT: Then the United States has
12 nothing further on the probable cause issue.

13 Would you like me to proceed to the other
14 issues that were discussed now or --

15 THE COURT: No. I want to see if
16 Ms. Passino has any response.

17 MR. GOLDFOOT: All right. Thank you.

18 MS. PASSINO: Just a much shorter response
19 than the first time I was up here.

20 I would say that Guest versus United States
21 versus Tillotson cited by the government just now --
22 neither case presents facts similar to those alleged
23 in the affidavit. And both cases suggested the
24 nature of the crime under investigation is a
25 consideration when determining how much of -- the

1 scope of the search of the computer.

2 Page 11 of the affidavit -- I'm not sure
3 how that is a preview. It does not seem to set out
4 what forensic -- what the forensic examine would look
5 like other than to say that a forensic examination
6 will be done and --

7 THE COURT: What do you propose would be
8 the proper language in a search warrant to limit with
9 the sufficient detail you propose the places to be
10 searched?

11 MS. PASSINO: I think that would be a
12 case-by-case determination.

13 THE COURT: Well, use this one. Tell me
14 what would be a proper language? You can only search
15 in what?

16 MS. PASSINO: I think one of the easiest
17 ways that says you can only search in -- you can only
18 search in parts of the computer relevant to the dates
19 in which the allegations are referenced to.

20 A computer -- a hard drive is unlike a
21 house, so I don't want to say that only certain parts
22 of it can --

23 THE COURT: Well, I don't limit anything
24 else that way, do I? In other words, I think you use
25 the example of going to search for say a stolen

1 lawnmower.

2 Okay. So I say, well, I've got after an
3 affidavit of people who have seen it at this
4 residence and have pictures of it and all that --
5 that I have reason to believe that that lawnmower
6 will be found at that residence. Okay?

7 Well, that may give them probable cause to
8 search the residence to see where the lawnmower is.
9 Do I have to put in there that you may not search the
10 drawers in the kitchen, because that wouldn't be
11 proper to be looking in a drawer in the kitchen for a
12 lawn mower.

13 MS. PASSINO: No --

14 THE COURT: So that would go to exceeding
15 the scope, but do I have to put that in a warrant,
16 that I make a trip to the house first to find all the
17 places where I don't want them to look?

18 MS. PASSINO: There are -- And although the
19 name of is escapes me, but there are Supreme Court
20 cases that say you don't look for a firearm in a
21 space that a firearm couldn't fit.

22 THE COURT: Exactly.

23 MS. PASSINO: With bits of data you do need
24 to be more specific. And I think that was the final
25 point that -- The government ignores the

1 particularity requirement when it says that there
2 must be probable cause for an item. There must be
3 probable cause for an item that has been particularly
4 described.

5 So the lawnmower can't fit in a drawer but
6 a bit of data can fit in other places. And I don't
7 know --

8 THE COURT: So you have to look everywhere.
9 It's sort of like looking for drugs in the house as
10 opposed to looking for a lawnmower. You look
11 different places.

12 But the probable cause for the search
13 warrant itself, which is all we're arguing right now,
14 is the same.

15 The issue that would be the problem would
16 be after a completely proper search warrant was
17 issued but that agents or officers decided to exceed
18 it and start looking everywhere and rummaging, which
19 is the second part of your argument. But I'm still
20 on the first part.

21 MS. PASSINO: And I don't know this is an
22 example that the Court has heard many times before,
23 but I heard it for the first time recently, which is
24 that I think it's a gigabyte of information is
25 equivalent to a stack of paper the height of the

1 Washington Monument, 555 feet tall. So that a
2 16-gigabyte computer, like the one that was seized
3 from Mr. Kernell --

4 THE COURT: Uh-huh.

5 MS. PASSINO: -- that I think is
6 categorically different from a house with a lawnmower
7 because the particularity required under the Fourth
8 Amendment is something that can be -- that is
9 required on the front end to limit the places in
10 which that's searched.

11 And when you've got that many documents
12 involved and that much information involved to
13 leave -- to have unfettered discretion to search
14 anywhere when there are ways in which it could be
15 limited is I think where we differ with the
16 government.

17 THE COURT: All right. Maybe I'm beating a
18 dead horse, but I'm going to try to ask this one more
19 time in a different way.

20 It seems that you're arguing that if I had
21 issued a search warrant for the lawnmower and the
22 officers or agents had gone through the drawers, that
23 that would have been improper, but you make the
24 argument by saying not only did they exceed the scope
25 of the warrant but your warrant was bad to begin with

1 because you knew they were going to do that, or you
2 allowed them to do that, or you didn't place
3 limitations that kept them from doing that. Ergo,
4 simply issuing a search warrant for the lawnmower,
5 even though there is probable cause to believe it was
6 there, was wrong because you shouldn't have done it
7 until you put all this other stuff in the search
8 warrant.

9 Now, I'm trying to figure out where you get
10 any support for that.

11 MS. PASSINO: The --

12 THE COURT: And again is that going to be
13 the case now in your mind with other matters that
14 don't involve computers?

15 MS. PASSINO: The government is correct
16 that this isn't -- that the common practice is to do
17 what was done -- what they sought to do, which is to
18 seize a computer and search it.

19 But those cases did not present the
20 opportunity to talk about a brief crime, a one-time
21 thing, versus -- I don't want to say in most cases
22 but the cases that both sides have argued are cases
23 factually different, so that there wasn't the
24 established protocol for putting a protocol into a
25 search warrant.

1 It sort of skips over the issue, which is
2 the attachment to the warrant limited in paragraph
3 one the documents and computer files that the
4 government could search for, that that limitation
5 must have been flagrantly disregarded if that
6 limitation wasn't abided by.

7 So not knowing what the Supreme Court may
8 eventually say on this point, the point that is there
9 in the precedent goes to the manner of the execution,
10 that when there are limiting terms in a search
11 warrant -- and even though there wasn't a protocol in
12 this warrant, what there was was some kind of stopper
13 on the discretion of -- to search everywhere and
14 everything.

15 And I think once again I haven't quite
16 answered your question which is to say that --

17 THE COURT: Well, I think that I know that
18 we may be dealing with a little bit of semantics, and
19 I want to get to that in one second.

20 I want to ask you one last question about
21 another issue, when you keep talking about the
22 one-time thing, the one-time event.

23 And suppose again there was a one-time
24 event in a business, and there's testimony that this
25 document was created, and there's probable cause to

1 believe that it exists, and it was, quote, stuck in a
2 filing cabinet.

3 Now, how will they find that one document
4 or two documents that were created in a one-time
5 event without going through the entire filing cabinet
6 looking for it?

7 MS. PASSINO: I think when I refer to a
8 one-time document in contrast to sort of a pervasive
9 scheme of criminal activity, what the distinction I'm
10 trying to bring to the Court's attention is that as
11 with any kind of search warrant the search warrant is
12 issued based on the probable cause given the
13 particular facts in a specific case.

14 So even if a business were engaged in a
15 one-time thing and next door there was a business
16 engaged in lots of things for which there was reason
17 to go in and search their files, I think that gets to
18 the reasonableness of the execution of the warrant,
19 the number of times, the duration.

20 And that may be difficult to say on the
21 front end, but I think it's clear looking at what has
22 happened that that wasn't the case here, that there
23 is -- that there shouldn't be a one-size-fits-all-
24 computer exception.

25 THE COURT: What I think we're having a

1 problem with in the semantics is I think the issue is
2 what they were searching for as opposed to what they
3 were searching in. I think you don't have problems,
4 do you, with what they were searching for?

5 MS. PASSINO: That's not the focus of our
6 argument, no.

7 THE COURT: Okay. The focus of your
8 argument is they searched in files and places that
9 they had no business going.

10 MS. PASSINO: In part, yes.

11 THE COURT: All right. Anything more on
12 that issue from either side?

13 MR. GOLDFOOT: No.

14 THE COURT: All right. Let me hear at this
15 point from the government about why I shouldn't allow
16 some form of an evidentiary hearing when it seems to
17 be part of your argument that a reasonableness
18 determination should be made after the execution of
19 the warrant? And that's the judicial review that
20 remains available for the protection of the suspect.

21 MR. WEDDLE: And, Your Honor, if the
22 defendant had specified any evidence at all as being
23 outside the scope of the warrant, that might
24 certainly be the appropriate way to proceed.

25 In this case the defendant has only said

1 the scope was exceeded and said at some point, well,
2 we're not prepared to go forward until we see the
3 government's expert report and that way we'll know
4 what evidence was seized and what evidence the
5 government is relying on.

6 Well, we have provided that. And still to
7 this date there has been no identification of any
8 specific file, data, document, or other evidence that
9 they say -- the defendant says is outside the scope
10 of the warrant -- was taken outside of the scope of
11 the warrant, and what the defendant wants to do is
12 simply put the government's agents on the stand to
13 see if they can come up with something and I guess
14 ask how many times did you look in a file, how many
15 people looked, how long did you look.

16 That's not proper examination and that's
17 not the proper subject, Your Honor, until the
18 defendant I think -- and the defendant has the
19 burden -- until the defendant can specify, "File A,
20 B, C was outside the scope of the warrant because,"
21 then we're in no position to put on any evidence.

22 THE COURT: So you're saying the defendant
23 has to specify evidence that was seized that was
24 outside the scope of the warrant, not searched?

25 MR. WEDDLE: Yes.

1 THE COURT: Because they can't possibly
2 know what you searched, can they?

3 MR. WEDDLE: Yes, they know what we
4 searched. We searched the computer.

5 THE COURT: So it's every file? So why do
6 they need to limit --

7 MR. WEDDLE: Well, they certainly know and
8 they certainly concede that some files were within
9 the scope of warrant.

10 THE COURT: Right.

11 MR. WEDDLE: So until the defendant
12 designates what files are outside the scope -- I mean
13 perhaps if those are identified, I think we have a --
14 we should have an opportunity at that point to at
15 least brief, okay, why is this outside the scope,
16 before we talk about -- before we put agents on the
17 stand to say, well, tell me how you did this search.

18 Because it may be that the evidence -- it
19 may be that the file that the defendant says is
20 outside the scope of the warrant, fine, we won't use
21 that. No need for any evidence.

22 We're putting the cart before the horse,
23 Your Honor, is all I'm suggesting. Until the
24 defendant can come forward and make some showing
25 about what specifically is outside the scope of the

1 warrant, then there's no need for any evidence on it.

2 And that's our position, Your Honor, and
3 especially as it applies to putting government agents
4 on the stand, which I think is kind of a separate but
5 related issue.

6 THE COURT: What about this line, "Agents
7 operate under significant restrictions when they
8 search a hard drive. As with any search, the manner
9 in which a warrant is executed is subject to later
10 judicial review as to its reasonableness."

11 MR. WEDDLE: I think that's absolutely
12 true, Your Honor.

13 THE COURT: And how does one conduct a
14 judicial review of the manner in which a warrant is
15 executed without inquiring as to the manner in which
16 a warrant was executed?

17 MR. WEDDLE: The Court need -- What I'm
18 saying is the Court need not conduct such a review --
19 or the review is conducted only with respect to the
20 evidence which is alleged to be outside the scope of
21 the warrant.

22 For instance, the lawnmower. You've got a
23 warrant to go seize a lawnmower, and what the
24 government does is they bring back a kitchen knife
25 and say, We want to put this into evidence. Fine.

1 Was that outside the scope of the warrant? That
2 would be subject to review. How did you get that
3 knife? What allowed you to go into the kitchen
4 drawer to get that knife --

5 THE COURT: I agree with that part. Okay.
6 Maybe their argument is plain view or anything else.
7 That's not my point.

8 MR. WEDDLE: But to simply say the
9 government got a lawnmower but they went through the
10 kitchen drawers as well. So?

11 THE COURT: What do you mean "so"? Do you
12 think it's okay that the government can just stand up
13 and say you told us to go look for a lawnmower, but,
14 you know what we did? We went through every drawer
15 in that house. We went through all the kids' stuff.
16 We went through their computers. We went through
17 everything. And our answer is "so". So what?

18 MR. WEDDLE: No, Your Honor. I'm telling
19 you that that then goes to whether it was a general
20 warrant.

21 THE COURT: What if the warrant was very
22 specific? It said go only find a lawnmower.

23 MR. WEDDLE: Right.

24 THE COURT: But you went way beyond going
25 to look for a lawnmower. You looked in all these

1 places a lawnmower couldn't be. Are you saying that
2 converts an otherwise really good search warrant into
3 a really bad search warrant?

4 MR. WEDDLE: No. What I'm saying, Your
5 Honor, is what is the evidentiary -- what is the
6 review? What would the Court be reviewing at that
7 point?

8 THE COURT: If the --

9 MR. WEDDLE: To suppress the lawnmower?

10 THE COURT: If the acts of the agents was
11 so far beyond the authorization to search that they
12 converted their search into a general search.

13 MR. WEDDLE: Exactly. Exactly, Your Honor.
14 And what I'm saying here is that I think we've moved
15 beyond that.

16 Until the defendant can for instance say
17 that, well, this is why it's a general warrant,
18 because the agents went in and they rummaged through
19 the drawers, they rummaged through the closets, they
20 rummaged through the whole house, looking for a
21 lawnmower, that just shouldn't be allowed.

22 And what I'm saying here, Your Honor, is we
23 don't have that yet. The defendant hasn't said
24 they've rummaged through files that they had -- And
25 these are the files they had no business rummaging

1 through. This is the part of the computer they had
2 no business looking at.

3 And until they can articulate that I'm not
4 sure what evidence it is -- why the Court would be
5 taking any evidence, what the Court would be
6 reviewing.

7 THE COURT: Well, part of the problem of
8 course is trying to limit that sort of an inquiry,
9 because I agree with you they haven't isolated those
10 except to talk about the e-mail between Mr. Kernell
11 and his aunt.

12 MR. WEDDLE: Well, I think what they're
13 talking about is actually e-mail between third
14 parties, not Mr. Kernell, when Mr. Kernell did not
15 have the computer.

16 Now, that's taking -- Our position is
17 that's taken care of in the second warrant, which we
18 went back to the Court and asked for evidence of user
19 attribution. We had to determine -- at that point we
20 needed to determine who was using the computer when.
21 But that's -- You know, that's a separate -- Fine, if
22 they want to hear evidence on -- take evidence on
23 that, we can do that, but that's covered by --

24 MR. DAVIES: If there's a second warrant
25 and affidavit, we don't have a copy of that. That's

1 part of our problem here is that we don't believe
2 that there was application to extend the scope of the
3 search beyond what was set out in the original
4 warrant.

5 THE COURT: What do you say about that?

6 MR. WEDDLE: I thought we had provided all
7 warrants to counsel.

8 THE COURT: Well, do you have any problem
9 providing him with the second warrant and affidavit?

10 MR. WEDDLE: Oh, of course not. I thought
11 we had done so.

12 THE COURT: It seems a little late to be
13 finding that out.

14 MR. DAVIES: And that's never been at issue
15 in any of the government's responses.

16 THE COURT: But irrespective of that, it
17 seems to me that the primary argument has been --
18 without putting words in their mouth, is that they
19 essentially say you looked through every file. I'm
20 not going to sit here and list a million files. I'm
21 just going to say all. And you conceded in your
22 response, "We did look through every file."

23 MR. WEDDLE: Right.

24 THE COURT: So why should they say, okay,
25 we'll sit down and we'll list them all, and you will

1 take out the 10 or 15 that you had access to, and
2 we'll argue about each and every one of the others,
3 as opposed to just the generic, "You rummaged through
4 the entire computer, and you didn't have authority to
5 do that."

6 MR. WEDDLE: And I guess what we're saying
7 is we did have authority to look through the whole
8 computer because that's what the warrant gave us the
9 authority to do. We told the Court this is how we
10 have to look through a computer. And that's how we
11 did it.

12 Now, we have after that fact -- And that's
13 why -- I mean I'm not -- I don't want to put words in
14 Mr. Davies' mouth either. But I think that's why
15 Mr. Davies wanted this hearing to be continued until
16 he could get the government's computer forensic
17 report, so that he could see how -- what the
18 government looked through and what evidence was
19 obtained in that analysis. He now has that.

20 And all I'm saying, Your Honor, is it's
21 time -- That being the case, let's identify then
22 specifically why you think we rummaged through files
23 that we weren't supposed to.

24 I mean I don't want to say I'm circular,
25 but I think that's what we were talking about earlier

1 today is what files we could actually look through.
2 And I think the warrant authorizes us to look through
3 all the files.

4 Now, that being the case now that the
5 report has been delivered to the defense I think it's
6 incumbent upon the defense to say, well, this is why
7 they were not -- they should not have been permitted
8 or the warrant didn't permit them to look through
9 this category of files, these kinds of files,
10 whatever.

11 And I think that's our position, Your
12 Honor.

13 THE COURT: All right. So basically it
14 would be your position that in searching the computer
15 you can't have an excessive search?

16 MR. WEDDLE: I didn't say that, Your Honor.

17 THE COURT: Well, if you search everything
18 in it, what else could there be?

19 MR. WEDDLE: If we searched through a
20 computer, looked through all the files, and then it
21 later turned out that we discovered for instance we
22 were looking for evidence of this crime and we
23 discovered photographs and those photographs are,
24 say, of child pornography, so they're a separate
25 crime -- if we then go and conduct further searches

1 on that without going back to the Court, perhaps
2 we've exceeded the scope of the warrant.

3 But it's up to the defendant to say, well,
4 see, this is what the government did. They looked in
5 these files and they found this, and they continued
6 to search for evidence of child pornography. The
7 warrant did not give them the authority to continue
8 to search the computer for child pornography. They
9 exceeded the scope of the warrant.

10 We don't have that here. We haven't gotten
11 to that step yet.

12 THE COURT: So when you put in your brief
13 that the touchstone of reasonableness which governs
14 the Fourth Amendment governs the method of execution
15 of the warrant and the reasonableness of the
16 officer's acts both in executing the warrant and in
17 performing a subsequent search of seized materials
18 remains subject to judicial review, are you saying
19 that this type of evidence that the defendant seeks
20 is appropriate but not yet?

21 MR. WEDDLE: Yes. Yes.

22 THE COURT: And it's incumbent upon him to
23 identify the limits of the inquiry?

24 MR. WEDDLE: Yes, or to at least raise --
25 make some showing of why it is that he says the

1 search was outside -- that the agents exceeded the
2 scope of the warrant.

3 THE COURT: Okay. You have no problem with
4 whatever analysis I make or decision I make
5 predicated on the fact that basically all files
6 were looked into?

7 MR. WEDDLE: Initially, yes.

8 THE COURT: Okay. All right. Let me ask
9 the defense now.

10 If given that, and given your argument
11 first I think that looking into all files is
12 excessive, why do we need to break it down into
13 anything further?

14 MR. DAVIES: Well, I think we need to look
15 at how they looked at every file. And that's one of
16 the key issues for which we need an evidentiary
17 hearing.

18 THE COURT: Why?

19 MR. DAVIES: Well, it's interesting. Most
20 of the questions that the Court was asking
21 Ms. Passino about how it can be limited -- how can
22 something be limited by subject matter, how could
23 something be limited by time, how could something be
24 limited by type of file -- Those are issues of fact
25 that I think can be answered by the agent because

1 it's really not that complicated. They have forensic
2 programs that can -- My understanding is they can do
3 those things.

4 I think we're really making this more
5 complicated than we need to. We have clearly alleged
6 that the execution was far beyond the scope of the
7 warrant because the warrant sets out in paragraph one
8 the limitations for what they're supposed to be
9 looking for.

10 And we have alleged that they did searches
11 on that computer, repeated searches, using different
12 programs, which we want to inquire about, that
13 resulted in really just a wholesale examination of
14 things that were completely irrelevant.

15 Now, what Mr. Weddle is saying I think --
16 You know, I think I now understand that. What we've
17 done in the past, for example, on pleading that the
18 scope of a warrant was exceeded is to take the
19 return, for example, and to go through and identify,
20 for example, if there's a return, identifying
21 business records. We've gone through and identified,
22 "We feel based on the language of the warrant that
23 these thousand records were seized in excess of the
24 scope." And I've done that before.

25 The problem is there is no return -- We

1 don't have a return like that here. We don't have a
2 list of the files that were examined and how they
3 were examined. The forensic report --

4 THE COURT: All right. Let's stop because
5 we keep using terms I don't understand.

6 MR. DAVIES: Okay.

7 THE COURT: I don't think I've ever seen a
8 return that listed what was examined.

9 MR. DAVIES: No, no. I didn't mean to say
10 that.

11 THE COURT: That's why I'm getting
12 confused.

13 MR. DAVIES: Okay. In a basic --

14 THE COURT: And maybe we need to be very
15 careful with the use of our terms search and seizure.
16 They are two different things. One searches a house;
17 one seizes what I authorized them to seize.

18 MR. DAVIES: Right.

19 THE COURT: Okay. Go ahead.

20 MR. DAVIES: Unfortunately in the computer
21 context it's done in the opposite order. The seizure
22 occurs first and then the search occurs.

23 And that's why -- The example I was trying
24 to give is based on a traditional search for business
25 records, for example, where you go into a business

1 and seize file folders. In that instance there would
2 be a return that sets out the file folders that were
3 seized and --

4 THE COURT: But not every one that was
5 looked at?

6 MR. DAVIES: Right, but what we would be
7 arguing there is that these thousand folders were
8 seized outside the scope. It would be easy -- Well,
9 it would be possible to go through and highlight the
10 ones that we say --

11 And what I'm saying is that in this case we
12 don't have an inventory that shows every computer
13 file that was examined and how. What we do have is a
14 forensic --

15 THE COURT: But you wouldn't have that if
16 they were searching through a file cabinet.

17 MR. DAVIES: I believe we would. I think
18 --

19 THE COURT: They wouldn't give you an
20 inventory of every file they looked into --

21 MR. DAVIES: Or you could make --

22 THE COURT: Pardon?

23 MR. DAVIES: -- or you could make one just
24 by looking at them. You could identify them fairly
25 easily, the ones you say were outside the scope.

1 Here what we've got is we've got a forensic
2 report. The forensic report identifies certain
3 things like the types of software that were used, the
4 basic types of examination that were done.

5 It doesn't give us any detail as to how or
6 the scope, the timing, how long it took. And we
7 don't have a list of the files that were examined.
8 Now, we can --

9 THE COURT: But my point is -- and I keep
10 getting back to this -- you don't do that in anything
11 else, any other setting. You don't get a return that
12 says here's exactly how we went through the file
13 cabinet, or one that says here is how long we took in
14 drawer one, drawer two, or here's how long we took in
15 the entire filing cabinet. You don't get that kind
16 of breakdown. Right?

17 MR. DAVIES: Right.

18 THE COURT: My concern is that if --
19 partially -- part of my concern is why I should even
20 do that in this case. But if I did, then would I
21 have to then do that for all other searches? You
22 know, if you're searching files on a computer, you'd
23 have to do it; so if you're searching files in a file
24 cabinet, you've got to do it, too.

25 MR. DAVIES: Yeah, and I'm not sure I

1 understand how this would lead to any kind of
2 expansion, and maybe my example made it too
3 complicated.

4 But all I'm saying is if you've got pieces
5 of paper, you can go look at them, and you can see
6 what the government seized. You can just look at
7 them and identify for the Court which ones you say
8 were outside the scope. Here you can't do that.

9 THE COURT: You haven't been provided what
10 was seized?

11 MR. DAVIES: We've been provided with the
12 hard drive and with the forensic report, but there's
13 no --

14 THE COURT: Why isn't that the functional
15 equivalent of being provided the file cabinet with
16 all the documents in it?

17 MR. DAVIES: Well, because there's no way
18 you can look and tell from the material that we've
19 got which files have been examined and how extensive
20 it was.

21 THE COURT: They said they looked at them
22 all. They've agreed I can make my ruling premised on
23 the notion they looked at every single file. You
24 can't find one that they didn't look at.

25 MR. DAVIES: And so what we would say is

1 that the files -- Well, it's really not that simple,
2 but the files that were -- what was done that was
3 outside the scope of the warrant deals both with
4 which files were examined and how.

5 THE COURT: They were all examined.

6 MR. DAVIES: And how is another key
7 question, because, look, if you are running a
8 forensic program, for example, that takes paragraph
9 one of the warrant and puts in those items, the
10 e-mail address gov.palin, you know, for example --
11 the e-mail addresses that we're looking at -- and you
12 are searching forensically with a computer search
13 program for files containing those key terms, and you
14 are limiting the search to the date -- the
15 approximate date upon which these allegations
16 occurred, then there might be an argument that you
17 are not exceeding the scope of the warrant.

18 But if you were expanding your search and
19 are just examining every single thing to see
20 everything that's on there, then you are exceeding
21 the scope.

22 And that's why we need to put on evidence
23 to show what programs were used, to what extent they
24 actually looked at the information that is in
25 nonrelevant files, how long that took, what the

1 intrusion was.

2 We can -- We could point to the Court some
3 instances where it's very clear from the report that
4 there were files that were both examined and used
5 that don't have anything to do with what this Court
6 gave the government authority to do.

7 And I would just give as an example -- This
8 was a secondhand computer and it came from
9 Mr. Kernell's aunt and uncle. The IP address that is
10 involved in this case, Mr. Kernell's IP address,
11 wasn't used until September 2nd, 2008.

12 There is apparently -- and we can't tell
13 exactly how much from the report, but there was
14 apparently a wholesale examination of the e-mail
15 correspondence from other IP addresses that involved
16 Mr. Kernell's aunt and uncle before he ever had the
17 computer.

18 And essentially there's no way we can prove
19 our allegations without an evidentiary hearing.

20 THE COURT: Okay. I'm going to take a
21 short break. I want to ask one question before I do.

22 Mr. Weddle, are you contending anything
23 seized in this case was seized beyond the parameters
24 of the warrant?

25 MR. WEDDLE: No.

1 THE COURT: All right. So there's not
2 going to be any argument of plain view. There's not
3 going to be any argument of probable cause or
4 something that was illegal, anything like that.
5 Okay.

6 MR. DAVIES: Can I just say one more thing
7 I forgot to say?

8 THE COURT: Sure.

9 MR. DAVIES: And that is if it's the
10 government's position that the defendant has to
11 particularize evidence, that it has been seized
12 outside the scope of the warrant, that's impossible
13 to do thoroughly.

14 What is possible would be to give the Court
15 examples that are set out in the forensic report, but
16 it would be impossible without having the ability to
17 obtain information from the forensic examiner to
18 identify everything that we say is outside the scope.

19 THE COURT: Did the government identify all
20 the documents that it claims it seized as opposed to
21 searched; that is, documents that relate to rubico,
22 rubico10, Gov. Palin, or did you just give them back
23 a hard drive?

24 MR. WEDDLE: We just gave them back a hard
25 drive, Your Honor.

1 THE COURT: So they don't know -- as
2 opposed to in a search for documents case in a
3 warehouse or a business where you went through 10
4 file cabinets and selected 20 documents as being
5 within the scope. You would make copies of those, or
6 you would take the originals, and you would do a
7 return, saying these are what we seized. We went
8 through 10 file cabinets, but we only took these
9 documents. Now, what's wrong with doing that in this
10 case --

11 MR. WEDDLE: Well --

12 THE COURT: -- instead of saying -- What
13 you're saying essentially is we went through the 10
14 file cabinets. We stuck these documents back in
15 there. You guess which ones we took.

16 MR. WEDDLE: Well, I think we've done
17 better than that really. We provided computer
18 forensic reports which show the files that have been
19 seized and analyzed and how they relate to one
20 another.

21 THE COURT: Okay. You're shaking your
22 head. You're saying you didn't get that?

23 MR. DAVIES: Well, I guess it depends on
24 what analyzed means. I mean if they -- The only
25 thing that's in the forensic report is examples. So

1 they haven't set out every file that has been seized
2 and analyzed. There's a list of exhibits that are
3 made examples.

4 I have no idea whether we're talking about
5 10 million files that have been analyzed or -- you
6 know, the report consistently says this is attached
7 as an example, so there is no way --

8 THE COURT: I haven't been provided with a
9 copy of that report.

10 MR. DAVIES: I understand that.

11 THE COURT: So I'm having a hard time
12 knowing what it looks like.

13 MR. DAVIES: All these arguments are based
14 on issues of fact.

15 THE COURT: All right. Let me take a short
16 recess. We've been going at it for a pretty good
17 little while. Everybody probably needs a break.
18 We'll come back in about 10 or 12 minutes.

19 THE COURTROOM DEPUTY: All rise.

20 (A recess was taken.)

21 THE COURTROOM DEPUTY: All rise. This
22 Honorable Court is again in session.

23 Please, be seated.

24 THE COURT: All right. With regard to a
25 evidentiary hearing, the Court is not inclined at

1 this time to grant that for the following reasons:
2 One of the reasons to grant an evidentiary hearing
3 would be if items seized in the case were seized
4 based on reasons other than the argument that they
5 came within the warrant.

6 For example, plain view is the most common
7 one. Those require an evidentiary hearing. The
8 government has conceded that none of its seized items
9 in this case are being claimed as being seized other
10 than pursuant to the warrant.

11 The second reason proffered for an
12 evidentiary hearing has to do with the scope of the
13 search actually conducted by the government agents.
14 However, in this case the government has conceded,
15 and for purposes of my ruling I will take it as
16 conceded, that the search included searching all
17 files and items on the defendant's computer.

18 I really don't find that the defendant has
19 raised any significant question regarding the scope
20 of the search or the execution of the search beyond
21 the fact that the government searched every file. At
22 this juncture I don't feel like how they searched
23 every file is a basis for an evidentiary hearing.

24 Therefore, it appears to the Court that I
25 must first determine if the act of looking in every

1 file to find the appropriate documents and
2 information is either beyond the scope of the search
3 warrant or beyond what is legally permissible so as
4 to convert it into a general search. If not, there's
5 no need for an evidentiary hearing. If I find
6 otherwise, it may be the basis for an evidentiary
7 hearing.

8 But I think I have to make that call first,
9 and I'm not prepared to do that today. So I've got
10 to look and see what my ruling is on that and that
11 will guide me as to whether or not I think there is a
12 basis for an evidentiary hearing.

13 Now, another issue that came up was with
14 regard to the second search warrant and affidavit,
15 which I understand Mr. Weddle is going to get to
16 Mr. Davies. And I'm going to insist, unless you have
17 any objections, that you get it to him within the
18 next 24 hours.

19 MR. WEDDLE: I can give it to him -- a copy
20 right now, Your Honor.

21 THE COURT: All right. I also want you to
22 check and see if there is anything else. I don't
23 want any time we show up to find out there's other
24 discovery. So if you wouldn't mind --

25 MR. WEDDLE: I'll go back and doublecheck.

1 We have been doing that, Your Honor, and I thought
2 this was covered. If it had not been provided prior,
3 I apologize to the Court and Mr. Davies.

4 THE COURT: All right. As much as I'm
5 reluctant, I think I have to give the defendant some
6 additional time to consider filing another motion on
7 any new discovery. At this point all I know about is
8 that, but if there's anything you give him tomorrow
9 or the next day --

10 Accordingly, Mr. Davies and Ms. Passino,
11 I'm going to give you until July 27th to file any
12 additional motions, limited to new discovery. I'll
13 give the government, if anything is filed, until
14 August the 3rd to respond.

15 I am not going to set a hearing at this
16 point. Often I do that. It's easier to cancel them
17 than it is to schedule them, but at this point I have
18 no real strong basis to believe that there will be a
19 motion filed, although there might be.

20 But if there is, Mr. Davies, I'm going to
21 put the onus on you to get with Mr. Weddle and my
22 office to set a hearing. And we need to do that
23 promptly, because we're still staring at an October
24 trial date. And if things are still being filed in
25 late July and early August, that's making that trial

1 date a little difficult.

2 MR. WEDDLE: Yes, Your Honor. And I can
3 state that regardless of the second search warrant
4 the government is relying on the initial search
5 warrant for the authority for searching and seizing
6 the computer files. So I do think that this will
7 really not raise any new issues.

8 THE COURT: All right. I understand.

9 All right. Is there anything else that we
10 need to take up today?

11 Mr. Davies, you had a motion to authorize
12 issuance of subpoenas for pretrial production --

13 MR. DAVIES: Yes, Your Honor.

14 THE COURT: -- of evidentiary material that
15 we put off because you wanted to see what was
16 ultimately produced short of that. Where are we on
17 that?

18 MR. DAVIES: Can I ask one question for
19 clarification?

20 THE COURT: Yes.

21 MR. DAVIES: In essence the Court is going
22 to postpone ruling on Mr. Kernell's right to an
23 evidentiary hearing until making the decision as a
24 legal matter as to whether an examination of every
25 file is beyond the scope of the search warrant?

1 THE COURT: Or otherwise improper, yes.

2 MR. DAVIES: Okay.

3 THE COURT: And if I were to find that it
4 was beyond the scope of the search warrant, or if I
5 was to find that that was improper, converting it
6 into a general warrant or otherwise for the argument
7 that you made, then it might be that testimony
8 regarding what was done would be very relevant and
9 germane.

10 MR. DAVIES: So at this point I'm just
11 thinking about in terms of Mr. Kernell's need to
12 place things in the record. I'm going to hold off on
13 asking the Court to allow me to make a proffer of
14 what we will do until we get the ruling as to whether
15 or not we're going forward with the evidentiary
16 hearing, just simply because it's very important to
17 us to show not only the fact that every file was
18 looked at, but how I guess is the best way to say it.

19 So at this point if it seems -- that seems
20 like a proper course of conduct, I'm not going to try
21 to proffer something into the record simply because I
22 understand the issue is still pending.

23 THE COURT: Okay. Now, Document 36 -- Did
24 you resolve that?

25 MR. DAVIES: I resolved that the motion --

1 I don't believe the motion needs modification at this
2 point. And that's why I wanted to wait and look at
3 the additional discovery -- The real question I had
4 was whether the discovery I had received the day
5 before the last hearing made that motion moot or
6 whether it needed -- otherwise needed to be changed.

7 But our position is still the same, that
8 this is a case involving obviously highly technical
9 aspects of both the facts and the law and that under
10 Rule 17(c) simply those items that we have asked for
11 satisfy the four-factor test for allowing pretrial
12 production of certain documentation.

13 THE COURT: What is the motion? Let me
14 look at your motion. (Looking.) I at least
15 understand the subpoenas to Yahoo and to 4chan. Tell
16 me about the other subpoena.

17 MR. DAVIES: Okay.

18 THE COURT: And particularly in light of
19 the recent developments tell me about the other
20 subpoena.

21 MR. DAVIES: Well, I think -- The recent
22 development, meaning the fact that the governor has
23 expressed an intention to step down from the office?

24 THE COURT: Yes.

25 MR. DAVIES: I think actually it may make

1 the subpoena more important. I think we had proposed
2 a duces tecum attachment for the governor and/or the
3 custodian of records of the governor's office, which
4 at that time I think were probably one in the same.

5 But you can see that the proposed subpoena
6 asks for a limited set of documentation that is
7 directly relevant to the issues that are set forth in
8 the indictment itself. And I can go through those
9 item by item and let the Court know what element or
10 what aspect of the indictment I believe that they are
11 relevant to.

12 But again the main purpose of requesting
13 that these subpoenas be issued pretrial is under Rule
14 17(c)(1), which is of course a procedure that the
15 Rules of Criminal Procedure specifically envision,
16 that there are cases in which it is important for
17 counsel for both sides to be able to examine what are
18 probably going to become exhibits before the day of
19 trial.

20 And that's all this motion is asking for.
21 And the reason is -- I think the Court can see that
22 there are a lot of -- there's a lot of analysis that
23 ends up being done of each one of these electronic
24 type of documents in terms of how it relates to the
25 allegations, and we've got four forensic reports and

1 all kinds of things that are done. So it's not
2 like -- It's not the kind of thing that you can just
3 show up the day of trial and say let me see those
4 documents and then fully integrate them into your
5 theory.

6 So the purpose is asking so that we can be
7 ready so that we're not in a position of asking for
8 time once the trial begins.

9 And the documents requested from the
10 governor's office fall in -- There's a couple of
11 different categories. There are categories that
12 directly relate to the allegation of -- well, both of
13 improper access, unauthorized access, to a computer
14 and to the identity theft that is alleged in the
15 indictment.

16 For example, paragraphs 1, 2, 3 and 4 --
17 actually 5 -- actually 5, 6 and 7 all go directly to
18 the elements of identity theft. And we think that
19 those documents that are requested are not only
20 relevant but are evidentiary in nature.

21 Of course, as the Court knows, you can't
22 use Rule 17(c) just to ask for discovery. Okay.
23 It's not a civil rule where you can ask for
24 everything that may lead to discovery of relevant
25 evidence. What we have tried to limit the proposed

1 subpoena to is things that we think will be used at
2 trial.

3 And the allegation of course is of
4 unauthorized access. Most of those requests have to
5 do with authority, how the Yahoo account was set up,
6 who had authority, whose name it was in.

7 We also -- As the Court remembers from the
8 previous motion hearing, there is a major issue in
9 the case regarding whether these, you know,
10 identification documents, meaning the Yahoo address,
11 for example, identifies a specific individual. And
12 these requests go directly to that issue in terms of
13 who had access, who set it up, things like that --
14 when it was used, and things like that.

15 Paragraph 8 deals directly with the
16 allegation of invasion of privacy. And as the Court
17 knows, the invasion of privacy issue is one under
18 whatever analysis we end up using, if we go to trial
19 on that count, that is fairly complicated in terms of
20 figuring out what the elements are and what's
21 required and what the expectations of privacy are.

22 And those requests in paragraph 8 deal --
23 They are not an attempt to fish or anything like
24 that. Unfortunately they come directly from
25 something that's made relevant by the allegation in

1 the indictment. So I think we have shown that these
2 items are evidentiary in nature, that we don't have
3 any way of getting them without the 17(c) subpoena
4 and that these are the type of documents that the
5 defendant really needs to have some time before trial
6 to be able to analyze them and to be able to use them
7 effectively at trial so that I can provide
8 Mr. Kernell effective assistance of counsel.

9 And I think it's clear that the
10 applications are made in good faith and not intended
11 as a general fishing expedition from the fact that
12 we've tried to narrow them down to the point where
13 we've got.

14 Now, in terms of whether the custodian of
15 records and the governor may now be different, it
16 might be the case that I would seek to issue two
17 subpoenas rather than one. Frankly, I hadn't really
18 thought about that, but as a practical matter that
19 may be the result.

20 THE COURT: Number 8. You want any
21 voluntary disclosures of that private information?

22 MR. DAVIES: And I don't know how to narrow
23 it down more than that given --

24 THE COURT: Is it your contention that if
25 somebody voluntarily discloses their cell phone

1 number to a family member, that that opens it up to
2 the world?

3 MR. DAVIES: No, it's not voluntary
4 disclosure. I don't think it says to a family
5 member. It's voluntary disclosure of a family
6 member. And that's one of the things --

7 THE COURT: What if you disclosed it to
8 another family member?

9 MR. DAVIES: Well, I think -- Yeah, and
10 that's not what I meant to seek. And maybe I should
11 clarify the language there. What I'm talking about
12 would be voluntary -- See, the indictment says -- I
13 think the indictment says that one of the items was a
14 cell phone number that was disclosed.

15 If there was a voluntary disclosure of that
16 number previously -- And I'm not talking about -- I
17 can make it clear, if necessary. I'm not talking
18 about giving another family member your cell phone
19 number. I don't think that reduces your expectation
20 of privacy at all. I'm talking about voluntary
21 disclosure outside that zone of private family
22 interaction.

23 THE COURT: What if she voluntarily
24 disclosed it to somebody on her staff?

25 MR. DAVIES: I think that's -- I guess it

1 depends on the scope of disclosure. I think that
2 could be relevant to the charge of invasion of
3 privacy that we have.

4 THE COURT: Is your argument that if she
5 disclosed that to a staff person, like if you
6 disclosed your cell phone to your secretary, then
7 somebody could hack into your computer and get
8 that --

9 MR. DAVIES: Absolutely --

10 THE COURT: -- and then it wouldn't be any
11 invasion of privacy because you disclosed it to your
12 secretary?

13 MR. DAVIES: Absolutely not, but I think
14 that --

15 THE COURT: Well, what's the relevance
16 then?

17 MR. DAVIES: The relevance is that the
18 government has alleged an invasion of privacy, a
19 tort.

20 THE COURT: Right.

21 MR. DAVIES: And the simple question that
22 I'm trying to get at is whether these items are
23 private. And so the disclosure outside the normal
24 sphere of family influence I think would be relevant
25 to that.

1 And what I did -- I'm sorry.

2 THE COURT: Do you mean public disclosure
3 as opposed to voluntary?

4 MR. DAVIES: I'm not sure exactly how
5 it's --

6 THE COURT: If the billboard said call Wade
7 Davies at this cell phone number, it would be a
8 little hard to argue that cell phone number was
9 private.

10 MR. DAVIES: That's right.

11 THE COURT: But you want every record on
12 her computer that has to do with any voluntary
13 disclosure.

14 MR. DAVIES: And I think the problem -- the
15 problem is caused by the nebulous nature of being
16 charged in a federal criminal case with invading
17 somebody's privacy. I think I am required to attempt
18 to rebut every allegation that's made in the
19 indictment, and that's why I narrowed and
20 specifically asked for things that are mentioned in
21 the indictment.

22 THE COURT: Okay. What do you say about
23 that, Mr. Weddle?

24 MR. WEDDLE: I'm not sure how anyone could
25 describe this as a narrowed subpoena request. Number

1 5, "Any and all documents in your custody" --
2 Remember, this is the governor or her office --
3 "custody, possession, control, which relate, reflect,
4 and/or refer in any manner the manner in which a user
5 may authorize others to access a Yahoo e-mail account
6 and/or setting out the responsibilities of the user
7 for preventing unauthorized access."

8 I mean that's just a whole bunch of
9 documents related to the use of -- whether there's
10 any use of the governor or her office of a Yahoo
11 e-mail account, any Yahoo e-mail account.

12 I only say that to say, Your Honor, that
13 this is a very broad subpoena asking for a lot of
14 documents, which, number one, are not relevant. But
15 more important, I don't know how they are admissible.
16 I don't think that the subpoena has met the Nixon
17 requirements of relevance, specificity, and
18 admissibility.

19 I mean, Mr. Davies says it's not a fishing
20 expedition. Mr. Davies has a lot of discovery
21 related to this case, and I don't know how this is
22 not simply fishing for records.

23 THE COURT: I think he's saying that
24 because you've chosen to charge so many counts, so
25 many different specific things, that you made them

1 relevant.

2 MR. WEDDLE: Well, again, if Gov. Palin put
3 her daughter's cell phone number on a billboard,
4 yeah, that's no longer -- you're right, that's no
5 longer personal and confidential. If he wants to ask
6 of any of those occasions, fine.

7 But what he's asking -- what this is asking
8 for is any documents which relate, reflect or refer
9 in any manner to the voluntary disclosure of this
10 stuff. So that if Gov. Palin wrote a note to her
11 daughter, please, call so and so on my staff, or,
12 please call Janey, my friend, and tell her that I'll
13 be in -- and here's her telephone number and tell her
14 that I'll be in Wisconsin tomorrow, that is subject
15 to this subpoena. And what does that have to do with
16 anything in this case?

17 THE COURT: What about the ones to 4chan
18 and Yahoo?

19 MR. WEDDLE: Well, again, Your Honor, I
20 think that's all duplicative frankly mostly except
21 for --

22 THE COURT: Well, he just asked for I guess
23 things you're saying you've already given him.

24 MR. WEDDLE: A lot of, yes, Your Honor,
25 except there are items in here that fall kind of

1 outside of that. And that is number 9, "Any and all
2 documents to include but not limited to handwritten
3 notes, memoranda, reports, recordings, or other items
4 concerning Yahoo's interactions with law enforcement
5 agents in response to two subpoenas."

6 Number one, how is that relevant? I
7 suggest it's not. More importantly, how is it
8 admissible? Whatever communications Yahoo has with
9 law enforcement in response to subpoenas would seem
10 to me to be hearsay.

11 THE COURT: Well, other than number 9 on
12 the Yahoo one, do you have any problem with the 4chan
13 one?

14 MR. WEDDLE: Well, Your Honor, while I'm
15 looking at that, counsel has handed me a note also
16 that defense counsel has not addressed I guess the
17 authority of this Court to issue subpoenas which
18 would be consistent with the Electronic
19 Communications Privacy Act to the extent that these
20 subpoenas call for content of e-mails as well. I had
21 not even thought of that.

22 But with respect to 4chan -- Well, Your
23 Honor, I don't really know that I have anything to
24 say with respect to that except that I believe that
25 Mr. Davies -- We provided a fair amount of discovery

1 on 4chan. I don't know that it goes to -- for
2 instance in this case which relate, reflect, refer in
3 any manner to discussion of 4chan and its message
4 boards about Sarah Palin and her use of Yahoo e-mail
5 accounts.

6 I mean there are certainly -- We've
7 provided discovery with respect to the defendant's
8 communications through 4chan, but I guess he's asking
9 for all such discussions in September of 2008.

10 Your Honor, I guess our main point with
11 respect to these -- with the 4chan and Yahoo is that
12 the relevant evidence with respect to those
13 organizations provided in discovery and anything else
14 is irrelevant and inadmissible.

15 I mean I think primarily -- I mean I think
16 the primary concern is with the subpoena to Gov.
17 Palin and her office for these items which don't
18 appear to be relevant.

19 THE COURT: Okay. Last word, Mr. Davies.
20 I saw you shaking your head.

21 MR. DAVIES: No, just that -- I think the
22 government can come up with any example -- any kind
23 of extreme example that could be caused by the
24 wording of one of these requests. But if there's a
25 problem with the wording, the remedy would be to ask

1 me to draw it more -- draw the request more tightly,
2 because the requests that I've made are directly
3 relevant to the indictment.

4 THE COURT: All right. I don't know if
5 it's their obligation. What you've asked me to do is
6 ask me to authorize the issuance of these subpoenas
7 with this wording.

8 MR. DAVIES: And if there is a problem with
9 that wording, I guess what I would ask the Court is
10 permission to redraw the request rather than simply
11 to have it denied because it's inartfully stated.

12 THE COURT: It's not that it's inartful;
13 it's that it may be too artful.

14 MR. WEDDLE: I was going to suggest that
15 it's very artfully drawn, Your Honor.

16 THE COURT: Well, one of my concerns in
17 reversing the argument is the breadth of it. I mean
18 when you want all of September and you want
19 everybody's communications, that's a little broad.

20 MR. DAVIES: How about instead of inartful
21 how about if I try to do it better?

22 THE COURT: Narrowed would be better. All
23 right. I'll give you until -- What did I tell you a
24 minute ago?

25 MR. DAVIES: July 27th, Your Honor.

1 THE COURT: Yeah, July 27th to submit
2 narrowed provisions. I'm not sure it's good English.
3 We can probably assume from my commentary that the
4 narrower the better. It's not to say that I would or
5 I wouldn't grant them, but the narrower the better.

6 All right. Anything else? Is there any
7 other motions that I've missed or need to take up
8 today?

9 MR. DAVIES: Can we approach the bench for
10 just a minute?

11 THE COURT: You and Mr. Weddle?

12 MR. DAVIES: Yes.

13 THE COURT: Okay. We'll go off the record
14 for just a minute. I don't need all the lawyers, do
15 I?

16 MR. DAVIES: It doesn't matter to me. I
17 just want to take up one --

18 THE COURT: Let's just see what --

19 MR. DAVIES: Okay. All right.

20 THE COURT: If I need them, they can come
21 up.

22 (A conference was held at the bench.)

23 THE COURT: All right. Simply for the
24 record, a matter was brought up that was not subject
25 to any of the filings today or any of the motions,

1 and I've simply deferred that until we decide we need
2 to handle anything further on that matter.

3 Anything filed that we need to take up or
4 any other issues that the Court needs to be aware of?

5 MR. DAVIES: I don't think so, Your Honor.

6 THE COURT: Anything else, Mr. Weddle?

7 MR. WEDDLE: No, Your Honor.

8 THE COURT: All right. The Court will
9 stand in recess until the afternoon docket begins.

10 THE COURTROOM DEPUTY: All rise. This
11 Honorable Court stands in recess.

12 (End of Proceedings.)

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1 REPORTER'S CERTIFICATE

2 STATE OF TENNESSEE)

3 COUNTY OF ANDERSON)

4 I, Lynda L. Clark, Court Reporter and Notary
5 Public, in and for the County of Anderson, State of
6 Tennessee at large, do hereby certify:

7 That I reported stenographically the proceedings
8 held in open court on July 16, 2009, IN THE MATTER OF
9 UNITED STATES OF AMERICA VS. DAVID C. KERNELL; that
10 said proceedings in connection with the hearing were
11 reduced to typewritten form; and that the foregoing
12 transcript is a true and accurate record of said
13 proceedings to the best of my knowledge, skills and
14 ability.

15 I further certify that I am not kin to any of
16 the parties involved therein, nor their counsel, and I
17 have no financial or otherwise interest in the outcome
18 of these proceedings whatsoever.

19 This the 4th day of August, 2009.

20
21 _____
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23 My Commission Expires: 08/24/11.
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